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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 2054

GEORGE TURALLIO and CHARLES KAMPAS, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners George Turajlich and Charles Kampas pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming their convictions, after a jury trial, for bank robbery and conspiracy.

OPINION BELOW

The opinion of the Court of Appeals in this case has not been reported, but is set forth in the Appendix hereto, infra, p. 15. No opinion was filed by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered May 11, 1960. Rehearing was denied June 1, 1960. Petitioners

address themselves to this Court by authority of Title 28, U.S.C., Section 1254(1), in compliance with this Court's Rule 22(2).

QUESTIONS PRESENTED

1. Whether petitioners, tried jointly with a codefendant and convicted on sparse and controverted evidence, were accorded a fair trial when their codefendant (and alleged co-conspirator) dominated the selection of the jury, set the strategy of the defense, participated in the cross-examination of prosecution witnesses, and then—in the middle of the trial—entered a plea of guilty, which plea was immediately made known to the jury.

2. Whether petitioners were fatally prejudiced by an erroneous instruction, given in answer to questions put by the jury after it had commenced its deliberations, and given in such a way that their counsel had no opportunity to interpose an objection or ask for clarification.

STATUTES INVOLVED

The bank robbery statute (18 U.S.C. 2113), the conspiracy statute (18 U.S.C. 371), and the enactment making those who aid, abet or counsel chargeable as principals (18 U.S.C. 2) are not sufficiently in issue to warrant reproduction here. Petitioners rely on Article III, Section 2, and Amendment VI of the Constitution (Appendix, infra, pp. 18-19), and the following Federal Rules of Criminal Procedure: Rule 14, controlling joinder and severances (Appendix, infra, p. 19); Rule 24(b), controlling peremptory challenges (Appendix, infra, p. 19), and Rule 30, controlling instructions to juries (Appendix, infra, p. 20).

STATEMENT OF THE CASE

This case is an aftermath of the locally notorious "stocking bandit" holdup of a savings and loan association in Pittsburgh in 1956. The bandits, Joseph V. Riley and Stan-

ley F. Randall, apprehended elsewhere and charged with other crimes, confessed and implicated three Pittsburgh residents, petitioners Turajlich and Kampas and one Charles F. Creedon, an officer of the Pittsburgh police force.

Two indictments followed, one against Riley, Randall and petitioner Turajlich in three counts, for entering with intent to commit a felony, robbing the loan association, and jeopardizing the lives of association employees by threatening them with a pistol; the second against Riley, Randall, petitioners Turajlich and Kampas, and Creedon in four counts, charging Kampas and Creedon with entering, robbing, and jeopardizing lives, as above, and charging all five defendants (in the fourth count) with conspiring to plan and commit the robbery. Overt acts charged in connection with the conspiracy count were that Turajlich, Randall and Riley held a meeting to plan the crime, that Turajlich and Creedon told Riley and Randall that officer Creedon would help them make their escape safely, that Turajlich supplied guns and disguises for Riley and Randall, and that Kampas furnished and drove one of the get-away cars.

Petitioner Turajlich pleaded not guilty to the first indictment on November 19, 1958 (p. 11a*), and Turajlich, Kampas and Creedon pleaded not guilty to the second on January 27, 1959 (p. 2a). The two cases were consolidated on February 3, 1959 (p. 3a and p. 12a). Riley and Randall were not arraigned until the morning of the trial, October 5, 1959, when both entered guilty pleas in open court.

Meanwhile petitioners' counsel and Pearse O'Connor, Esq., a distinguished member of the Pittsburgh bar representing officer Creedon, proceeded to prepare their defenses relying, at least so far as petitioners' counsel was concerned, on a sworn statement given by Creedon on March 27, 1959, avowing his complete innocence.**

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* Page references designated "a" are to Appellant's Appendix, printed below and filed herein; page references designated "b" are to Appellee's Appendix, printed below and filed herein.

** Printed in the Appendix hereto, infra, pp. 20-22.

Petitioners' counsel, also a lawyer of experience, skill and high standing at the bar, anticipating that the prosecution would rely heavily on testimony by confessed felons Riley and Randall, planned to put both his defendants on the witness stand, but judged that the most persuasive defense testimony would probably come from their co-defendant Creedon, whose reputation as a police officer was unblemished and who was to have been examined by O'Connor.

With this in mind, when the trial opened on October 5, 1959, he (petitioners' counsel) joined with O'Connor in exhausting the peremptory challenges they shared to empanel a jury including jurors McKenzie, Boyle, Evans, Cook, McQuaide, Maxwell and Kennedy, and alternate jurors Sullivan and Cummins.

The prosecution's proof, as anticipated, consisted solely of Riley's and Randall's stories (plus testimony from loan-association employees and a bystander witness to the robbery, who established federal jurisdiction and dramatized the crime itself but said nothing pertaining directly to the three defendants on trial).* If believed, Riley and Randall incriminated Turajlich, and Riley, wholly unsupported by Randall, incriminated Kampas. O'Connor's cross-examination of Riley tended further to incriminate Turajlich.**

At this point, after the noon recess *on the second day of the trial*, Creedon changed his plea. The trial Court told the jury:

> ". . . . . in your absence, the defendant Charles F. Creedon, who was charged in one of the indictments with conspiracy, has pleaded guilty to conspiracy. The Court accepted his plea after taking proper precautions so he is no longer a defendant in this case. He is no longer sitting at counsel table with his lawyer. The

*The entire record, including a transcript of all testimony, is intended to be filed with this petition pursuant to Rule 21(3) of the Rules of this Court.

**Original transcript, pp. 94-99.

matter affecting Creedon will be disposed of by the Court at some other time and place."*

Following this bombshell, the Court gave precautionary instructions, repeated in the charge, exhorting the jurors to disregard Creedon and his plea.

But petitioners' vigorously argued motion for a mistrial, a new jury, or a substantial continuance was denied (pp. 18a-36a), the Court adjourned the trial only until the following morning, and petitioners Turajlich and Kampas had thereupon to undertake, alone, to persuade jurors Boyle, McQuaide, Kennedy, Sullivan, et al. that Riley and Randall had confessed falsely and violated their oaths—while Creedon and O'Connor, now absent from defense counsel's table, lurked reproachfully in memory like shades of Banquo's ghost.

Nor were petitioners' defenses inconsiderable. Both denied any connection with the crime. Kampas (implicated only glancingly by Riley, dubiously connected with the alleged conspiracy, and remarkably *not* identified by Randall) produced an alibi. Turajlich gave evidence of ill will on Riley's part and a possible motive for the latter to "frame" him. Both produced credible character witnesses. Neither, at any point, was shaken in his protestations of innocence.

At the close of the case the trial Court, dismissing the first count (entering with felonious intent) against petitioners, gave instructions which were unexceptionable (pp. 37a-64a and pp. 16-28b**). But after the jury had been out several hours it returned with two questions evidencing confusion as to the law of conspiracy. In charging, the

* Original transcript, p. 105. It should be noted, for special bearing on one of petitioners' arguments, that Creedon pleaded guilt only to the conspiracy count on October 6, and that the other counts pending against him were not dismissed until October 8, the day the trial ended. (pp. 6a, 5a)

** Portions of the record were questioned as to accuracy, and revised versions are printed as appendices to the Government's brief below. This accounts for the duplicate references and the fact that two appendices are filed with this petition.

Court had unequivocally withdrawn from consideration the first two of the four alleged overt acts—the meeting to plan the crime, and the assurance of assistance allegedly given by Creedon—on the ground that proof of them had failed (p. 55a); the jury, on its return to the court room, asked if they could find the defendants guilty "solely" of overt acts, and specifically if they could find petitioner Turajlich "guilty of fourth count—overt acts 1 and 2 . . . ." (p. 65a). In response, instead of merely reemphasizing the plain instruction to disregard these acts, as previously given, the Court reviewed both acts 1 and 2 at some length, reduced his previously imperative admonition to "I do not think you should", and thus inescapably revived the spectre of Creedon's plea without further caution on that dangerous point (pp. 67a-69a). The Court also said, in the version originally transcribed, "As I instructed you before, you can find them guilty of conspiracy." (p. 66a—but, in fairness, cf., the Government's revised version, p. 31a).

Both versions of the transcript agree that at the end of this supplemental charge the Court ordered the jury to retire without giving counsel any opportunity to object or ask for clarification (p. 69a and p. 35b).

A verdict of guilty as charged, on all counts against both petitioners, followed shortly (pp. 5a, 6a, 14a). Motions for new trials were denied (pp. 70a, 71a), and petitioners were subsequently sentenced: Turajlich to 15 years and a $500 fine on one substantive count and 5 years for conspiracy, to run concurrently, and Kampas to 9 years on the substantive count and, concurrently, 5 years for conspiracy (pp. 71a, 75a). The Circuit Court of Appeals for the Third Circuit, in the judgment sought to be reviewed here, affirmed as to both petitioners (Appendix hereto, infra, p. 15).

REASONS FOR GRANTING THE WRIT

Only a single discovered case in all the American precedents affirms a conviction under circumstances closely simi-

lar to those complained of here: *Graff v. People*, 70 N.E. 299 (Ill., 1904), where one of five conspirators charged with insurance fraud changed his plea after the prosecution had rested and the others, compelled to continue the trial, were convicted. But in that instance the prosecution's case had been reopened and the co-conspirator who had entered the plea testified and submitted himself to cross examination. The appellate court, noting that supporting evidence of guilt was strong, that there was no collusion with the prosecutor,* and that the court itself had no foreknowledge,* merely concluded:

> "It seems to have been upon the spur of the moment, and to have been somewhat dramatic. It may be that it had some influence with the jury. . . . Be that as it may, and though it may have been an unfortunate circumstance for appellant, it was not one for which a blame can be attached to the court or to those representing the people.
>
> ". . . . the incident must be regarded as one of those unfortunate things that sometimes happen in the course of a trial, for which no one in particular is to blame." 70 N.E. at p. 304.

Petitioners here urge the intervention of this Court in the interests of justice and in exercise of its supervisory powers over the conduct of trials in federal courts.

But petitioners' case also lies at the nexus of several troublesomely unclarified areas in federal criminal law: the standards of discretion and fairness in compelling co-defendants to stand trial together; the evidentiary force of proved or admitted guilt among accused associates; the control of peremptory challenges and the protection of the integrity of trial juries; and the sweep of conspiracy as a

* While petitioners would welcome consideration of the evil that *could* be worked in this situation by hard-to-detect collusion between a compliant codefendant and the prosecution, they suggest none in this case; it is conceded that here the Government and the Court were as surprised as petitioners by Creedon's about-face, for this is known to be the fact.

dragnet for prosecutors. Too often defendants trapped in these areas have been consoled with placebos: the trial court's discretion is unassailable (while in far less important matters trial courts enjoy virtually no discretion at all); the wrong is no wrong because the jury has been instructed to disregard it; all the evidence persuades the reviewing court that the error is harmless (i.e., would not change the outcome if the appellate judges had sat as jurors); or the deprived right was conferred by grace and is therefore not truly a right at all.

If review is granted, petitioners will elaborate the following propositions for consideration by this Court:

1. In the circumstances of this case petitioners were denied due process and trial by an impartial jury (Constitution, Amendment VI). All the graceful epigrams exhorting the highest standards of purity in jury trials seem apposite here. See, e.g., *U. S. ex rel Toth v. Quarles*, 350 U. S. 11 (1955). Where gross unfairness is asserted, review should be freely accorded and—for the very reason that the standards are so vague—no substantial issue should be dismissed as within the unassailable discretion of a single trial judge. *Dimick v. Schiedt*, 293 U. S. 474 (1935); *U. S. v. Wood*, 299 U. S. 123 (1936); *Patton v. U. S.*, 281 U. S. 276 (1930).

2. Petitioners were also denied the effective assistance of their counsel (Constitution, Amendment VI), for counsel's best efforts in their behalf were turned into a fatal liability by circumstances entirely beyond his control, and his timely plea to the trial Court, who alone could have given relief, was rejected. *Glasser v. U.S.*, 315 U.S. 60 (1942).

3. Petitioners were also denied their constitutional right to be confronted with the witnesses against them (Constitution, Article VI). *Kirby v. U.S.*, 174 U.S. 47 (1899). Creadon's plea, made known to the jury after the prosecution's case against him and his codefendants, as con-

spirators, was in evidence, is equivalent in effect to a full confession in open court. *Shelton* v. *U.S.*, 242 F. 2d. 101 (CCA 5, 1957); *Edwards* v. *U.S.*, 256 F. 2d 707 (C.A.D.C., 1958) "... even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law." (Id. at p. 709). Circuit Judge Goodrich, writing for the Court whose judgment is sought to be reviewed here, has observed (in reversing a conviction where the jury was merely permitted to consider the fact that a co conspirator had pleaded nolo contendere *before the trial*):

> "From the common sense point of view a plea of guilty by an alleged fellow conspirator is highly relevant upon the question of the guilt of another alleged conspirator. If A's admission that he conspired with B is believed, it is pretty hard to avoid the conclusion that B must have conspired with A." *U.S.* v. *Toner*, 173 F. 2d 140, 142 (CCA 3, 1949)

Similarly, the Court of Appeals for the District of Columbia (reversing a conviction where the plea of a codefendant had been changed in open court), has held:

> "It will be seen that Mitchell was in all substance permitted to testify against appellant without taking the stand. The incident was clearly prejudicial to appellant and the error in permitting it is obvious." *Gainor* v. *U.S.*, 247 F.2d 583 (C.A.D.C., 1957).

A plea of guilty to the crime of conspiracy is "an admission by the defendant "that he had entered into the conspiracy with some one or all of his co-defendants . . . and that he or one of his co-defendants had committed one of the overt acts charged in the indictment, or some other overt act, for the pirrpose of effecting the object of the conspiracy." *Bergen* v. *U.S.*, 145 F.2d 181, 188 (CCA 8, 1944).

Cases where the prejudice complained of has been held to be obliterated because the confessing or pleading co-defendant takes the stand as a witness (*Nemec* v. *U.S.*, 178 F.2d 656 (CCA 9, 1949), cert. den. 339 U.S. 985; *Hockey*

v. *U.S.*, 165 F.2d 225 (C.A.D.C., 1947), cert. den. 333 U.S. 829; *Colt* v. *U.S.*, 160 F.2d 650 (CCA 5, 1947); *Walker* v. *U.S.* 93 F.2d 383 (CCA 8, 1937), cert. den. 303 U.S. 644), or because he *could* have been called (*Grundberg* v. *U.S.*, 145 F. 81 (CCA 4, 1906)), are not controlling here, for in this case Creedon pleaded guilty to *only one of the four counts* during the trial, on October 6, 1959 (p. 6a), and the other counts against him were not dismissed until October 8, 1959, the day the trial closed (p. 5a). The Government elected not to call him (p. 23a), and petitioners could not have elicited any testimony from him because of his privilege against self-incrimination. *Cole* v. *U.S.*, 100 F.2d 806 (CCA 5, 1939).*

It is noteworthy that petitioners were also caught in another trap, though it was not complained of below and hence is not, perhaps, available as a basis of relief here: they could not move for a severance from Riley and Randall, the confessed robbers, after the latter pleaded guilty the morning of the trial, for there was then no longer a question of separate trials. See, *Cole* v. *U.S.*, supra. But when Riley and Randall thereafter testified and admitted their guilt (Original transcript, pp. 22, 57), the effect was precisely to put in evidence proof of *their* guilt, properly inadmissible and which would have been necessarily excluded if their convictions had been separately obtained. *Babich* v. *U.S.*, 218 F.2d 538 (CCA 5, 1955); *U.S.* v. *Hall*, 178 F.2d 853 (CCA 2, 1949); *Lorton* v. *Government of Canal Zone*, 81 F.2d 914 (CCA 5, 1936).

4. Petitioners should have been granted a mistrial in effect a retroactive severance from Creedon's trial—after Creedon's plea (F.R.Crim.P., Rule 14); forcing them to proceed alone in the present circumstances was abuse of

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*This emphasizes the gross irregularity of the proceedings, for though Creedon and his attorney, O'Connor, actually withdrew from the courtroom after the plea, Creedon was technically still on trial, entitled and obligated to be present, until the other counts were disposed of. See, F.R.Crim.P., Rule 43; *Paxton* v. *U.S.*, 222 F.2d 794 (C.A.D.C., 1955).

discretion. Though the question of severance is, of necessity, determined initially on the threshold of the trial, trial courts must, and reviewing courts will, weigh subsequent developments and give relief to avoid hardship resulting from the enforced joinder of codefendents. *Kotteakos* v. *U. S.*, 328 U.S. 750 (1946); *Barton* v. *U. S.*, 263 F.2d 894 (CCA 5, 1959); *U. S.* v. *Haupt*, 136 F.2d 661 (CCA 7, 1943); *Hale* v. *U. S.*, 25 F.2d 430 (CCA 8, 1928); *People* v. *Fisher*, 164 N.E. 336 (N.Y., 1928). The practical effect of accepting Creedon's plea in the middle of the trial was *as if a severance had been given to him*. *Cole* v. *U.S.*, 100 F.2d 806 (CCA 5, 1939). It was manifestly unjust to compel his codefendants to go forward, over their objection, after he had shared most of the "day in court" to which they were jointly entitled and then had elected to forfeit his undivided portion of the balance.

5. Petitioners were effectively deprived of the right to peremptory challenges accorded defendants in federal criminal cases by F.R.Crim.P., Rule 24 (b), and in this instance the deprivation was substantial and highly prejudicial. Even in civil cases, trial courts may not interfere with the free discretion of litigants to use their peremptory challenges as they see fit. *Globe Indemnity Co.* v. *Stringer*, 190 F.2d 1017 (CCA 5, 1951); *Signal Mountain Portland Cement Co.* v. *Brown*, 141 F.2d 471 (CCA 6, 1944). See, *U.S.* v. *Chapman*, 158 F.2d 417 (CCA 10, 1947). And the same is true, *a fortiori*, in criminal trials. *Aebi* v. *U.S.*, 76 F.2d 39 (CCA 9, 1935). Cf., *Frazier* v. *U.S.*, 335 U.S. 497 (1948); *U.S.* v. *Wood*, 299 U.S. 123 (1936). In no other way can a defendant parry the "actual but unprovable" prejudice that is one of the underlying realities of human relationships in our times. *Carroll* v. *State*, 190 So. 437 (Fla. 1939). Petitioners are not bound by the holding in *Frazier*, supra, of such cases as *U.S.* v. *Mack*, 159 F.2d 677 (CCA 2, 1947), cert. den. 331 U.S. 810 and *U.S.* v. *Parker*, 103 F.2d 857 (CCA 3, 1939), cert. den. 307 U.S. 642, for in this case all

allowed challenges were used, in a bona fide effort to select a fair jury, and obvious prejudice is plainly—if, necessarily, somewhat delicately—suggested in this record. It has long been recognized that even after a jury is sworn the court, to protect the administration of justice, may investigate objections to its impartiality and, for cause, withdraw the case from its consideration. *U.S.* v. *Morris*, F. Cas. No. 15,815 (C.C. Mass., 1851).

6. Petitioners' conviction should not be allowed to stand because the jury received inadmissible and prejudicial evidence of the guilt of 3 codefendants (Riley, Randall and Creedon). Petitioners pray leave of this Court to brief fully the argument that where evidence *of the ultimate fact of guilt*, as contrasted with merely evidentiary facts, wrongfully reaches the jury, a mistrial must follow. In this circumstance, even the best of cautionary instructions cannot assure a just result. As the late Justice Jackson observed, concurring in *Krulewitch* v. *U.S.*, 336 U.S. 440, 453 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (Citations omitted).

The argument is strongest where, as here, the guilt in question is that of coconspirators. *Krulewitch* v. *U.S.*, supra; *Delli Paoli* v. *U.S.*, 352 U.S. 232 (1957); *Lutwak* v. *U.S.*, 344 U.S. 604 (1953); *Pereira* v. *U.S.*, 329 U.S. 211 (1946); *Kotteakos* v. *U.S.*, 328 U.S. 750 (1946); Cf., *Opper* v. *U.S.*, 348 U.S. 84 (1954).

In opinions in the Third, Fifth and Seventh Circuits, the reviewing Courts have interceded to upset convictions on the ground that cautionary instructions do not suffice where improper evidence of guilt has reached the jury. *U.S.* v. *Tomei*, 173 F.2d 140 (CCA 3, 1949); *Barton* v. *U.S.*, 263 F.2d 894 (CCA 5, 1959); *Schiffer* v. *U.S.*, 221 F.2d 17, 54 A.L.R. 2d p. 20 (CCA 5, 1955); *U.S.* v. *Haupt*, 136 F.2d 661 (CCA 7, 1943). Other Circuit Courts have affirmed

convictions, seemingly equally tainted by such evidence, on the ground that error was avoided merely by instruction to the jurors to ignore what they had heard. *U.S. v. Caron*, 266 F.2d 49 (CCA 2, 1959); *Johnson v. U.S.*, 82 F.2d 590 (CCA 6, 1936), cert. den. 298 U.S. 688; *Holmes v. U.S.*, 134 F.2d 125 (CCA 8, 1943), cert. den. 319 U.S. 776; *Nance v. U.S.*, 178 F.2d 656 (CCA 9, 1949) cert. den. 339 U.S. 985.

It would perhaps be straining to assert that the foregoing cases (and others, earlier and sometimes inconsistent, in the same Circuits) represent a sharp conflict, for each necessarily is tempered by its own circumstances. But it would also be straining to assert that the conglomeration represents even-handed justice. A definitive expression by this Court would provide guidance where now there is much confusion and uncertainty. See, *People v. Fisher*, 164 N.E. 336 (N.Y., 1928).

7. The trial Court erred in giving supplemental instructions on the law of conspiracy and its application to petitioners' case, and wrongfully denied petitioners' counsel an opportunity to interpose objection. F.R.Crim.P., Rule 30. *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76 (1919). *Schaffer v. U.S.*, 221 F.2d 17 (CCA 5, 1955); *Lucchi v. U.S.*, 163 F.2d 386 (CCA 4, 1948).

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

But recognizing that the only relief fairly to be granted them is a new trial before an impartial jury, and recognizing also that the circumstances of this case are unlikely to recur *in toto*, petitioners further respectfully urge, as an alternative to denial of this writ if the Court does not wish to entertain their arguments, that jurisdiction be

asserted solely for the purpose of remanding the case for a new trial. *Calvaresi et al.* v. *U.S.*, 348 U.S. 961 (1955).

Respectfully submitted,

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June 29, 1960

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,101 AND 13,102

UNITED STATES OF AMERICA

v.

GEORGE TURAJLICH AND CHARLES KAMPAS,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 4, 1960

Before KALODNER, HASTIE and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed May 11, 1960)

PER CURIAM:

Our examination of the record in this case discloses evidence sufficient to sustain the jury's verdict. We find no basic or prejudicial error in the District Court's conduct of the trial or in its instructions to the jury.

The judgment and sentence of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,102

UNITED STATES OF AMERICA

vs.

GEORGE TURAJLICH, CHARLES F. CREEDON, CHARLES KAMPAS, et al.

CHARLES KAMPAS, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk

May 11, 1960

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,101

UNITED STATES OF AMERICA,

vs.

GEORGE TURAJLICH, CHARLES F. CREEDON, CHARLES KAMPAS, et al.

GEORGE TURAJLICH, *Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT

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IDA O. CRESKOFF
Clerk

May 11, 1960

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,101

UNITED STATES OF AMERICA

vs.

GEORGE TUBAJLICH, *Appellant*

No. 13,102

UNITED STATES OF AMERICA

vs.

CHARLES KAMPAS, *Appellant*

SUR PETITION FOR REHEARING

Present: KALODNER, HASTIE and FORMAN, *Circuit Judges*.

AND NOW, to wit June 1, 1960 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

KALODNER
Circuit Judge

* * * *

The Constitution. Article III, Section 2

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

The Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

F. R. CRIM. P., Rule 14

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

F. R. CRIM P., Rule 24 (b)

Rule 24. Trial Jurors

(b) *Peremptory Challenges.* If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

F. R. CRIM. P., Rule 30

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

* * * *

COMMONWEALTH OF PENNSYLVANIA }
} ss.
COUNTY OF ALLEGHENY }

Personally appeared before me, a Notary Public in and for the Commonwealth and County aforesaid, CHARLES F. CREEDON, who being duly sworn according to law deposes and says that:

1. Deponent resides at 854 California Avenue, Pittsburgh 12, Pennsylvania and is aged thirty three (33) years.

2. Deponent was last employed by the City of Pittsburgh, Police Department.

3. Deponent has known George Turajlich for approximately four (4) years, and they have been close acquaintances during that time, but deponent has not been engaged in any business or joint enterprises with George Turajlich whatsoever.

4. Deponent was not personally acquainted with Charles

C. Kampas, Jr. in March of 1956 and did not become acquainted with him until on or about the Christmas season of 1957.

5. Deponent, to the best of his knowledge, has never seen either Stanley F. Randall or Joseph V. Riley personally; he has never talked with either said Stanley F. Randall or Joseph V. Riley; deponent denies that, particularly during the period of March 5, 1956, March 15, 1956, or at any other time or times prior thereto or since, did deponent meet with Joseph V. Riley, Stanley F. Randall, George Turajlich and Charles Kampas, or with either one or more of them, for the purpose of conspiring to commit any offense against the United States, and, particularly, deponent denies that he did enter into any meeting, conspiracy or understanding with any one or more of the said persons at any time for the purpose of planning or scheming to take or steal any money in the possession of Fidelity Savings & Loan Association located at 3330 Brighton Road, Pittsburgh, Pennsylvania; nor does deponent have any knowledge either of such criminal conspiracy or violation by any other person.

6. Deponent neither agreed with the said Joseph V. Riley or Stanley F. Randall or any other person on March 5, 1956 or at any other time to effect a safe escape of defendants after the robbery of said Savings & Loan Association.

7. Deponent denies that on or about March 15, 1956 he, either alone or in company with any other person, did enter the Fidelity Savings & Loan Association, for any purpose whatsoever; that on March 15, 1956, or at any other time, did he alone or in company with any other person, take from the person and presence of George Young, Executive Vice President, or Irene Labas, Clerk, in and for said Savings and Loan Association, any money or monies in any amount whatsoever; that, on or about the 15th day of March, 1956 or at any other time, did he alone or in company with any other person, assault the said George Young

or said Irene Labas or put in jeopardy the lives of the said George Young or Irene Labas in any manner whatsoever.

8. Deponent has voluntarily given this statement for the purpose of aiding Harry Alan Sherman, Esq. to investigate into the circumstances of the United States Grand Jury indictment returned against George Turajlich and himself, and to remove the onus of suspicion wrongfully pending against him by reason of the indictments.

That the facts hereinabove set forth are true and correct and may be used in the interest of justice in any proceedings either under indictments at No. 15689 Criminal or No. 15649 Criminal in the United States District Court for the Western District of Pennsylvania.

Charles F. Creedon

CHARLES F. CREEDON

SWORN to and subscribed before me this 27th day of March, 1959.

John G. Patterson, II

Notary Public

LE COPY.

Office Supreme Court, U.S.
FILED
JUL 29 1960
JAMES R. BROWNING, Clerk

No. 204

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE TURAJLICH AND CHARLES KAMPAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15) is reported at 277 F. 2d 805.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1960 (Pet. App. 16, 17). A petition for rehearing was denied on June 1, 1960 (Pet. App. 18). The petition for a writ of certiorari was filed on June 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a fair trial where the court, after permitting a co-defendant to

plead guilty during the trial, allowed the trial to proceed against petitioners under proper cautionary instructions regarding the guilty plea.

2. Whether the court erred in giving a supplementary charge which covered two questions asked by the jury regarding the conspiracy count.

RULES INVOLVED

Rules 14, 24, and 30 of the Federal Rules of Criminal Procedure provide in pertinent part:

> Rule 14. *Relief from Prejudicial Joinder.*
>
> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
>
> Rule 24. *Trial Jurors.*
>
> * * * * *
>
> (b) PEREMPTORY CHALLENGES. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.
>
> * * * * *

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioner Turaglich, together with Riley and Randall, were charged in an indictment (No. 15,649) returned in the United States District Court for the Western District of Pennsylvania with violations of the federal bank robbery statute, 18 U.S.C. 2113. The three counts respectively were for entering with intent to commit a felony, robbing the loan association, and jeopardizing the lives of association employees by threatening them with a pistol (R. 1a, 2b).[1] In a later indictment (No. 15,689) petitioners Turaglich and Kampas, together with Riley, Randall and Cree-

[1] "R." refers to the printed record consisting of appellant's appendix from 1a-7b and appellee's appendix from 1b-35b.

don, were charged with similar offenses in the first three counts and in the fourth count with a conspiracy to commit the robbery (R. 1a, 25b). The four overt acts alleged (1) that Turajlich, Randall, and Riley met to plan the robbery; (2) that Turajlich and Creedon advised Randall and Riley, the robbers, that police officer Creedon had agreed to help them in making an escape (R. 33b); (3) that Turajlich supplied Riley and Randall with loaded guns and disguises; and (4) that Kampas drove one of the getaway cars (R. 19b). The two cases were later consolidated (R. 3a, 12a). The jury found petitioners Turajlich and Kampas guilty on all counts remaining after the court had dismissed count 1 of each indictment (R. 5a, 6a, 14a). Turajlich was given a fifteen-year sentence and a $500 fine on count 3 in No. 15,649 to run concurrently with a five-year sentence on the conspiracy count (R. 71a–73a). Kampas was given a nine-year sentence on count 3 in No. 15,689 to run concurrently with a five-year sentence on the conspiracy count (R. 74a–75a). On appeal, the convictions were affirmed (Pet. App. 15–17).

1. Randall and Riley, who engaged in the actual robbery, pleaded guilty on the morning of October 5, 1959, the date when the trial began, and testified for the government (Tr. 21–22, 33–35, 57).[3] Randall's testimony incriminated Turajlich (Tr. 23, 27, 28, 36, 40) and Riley's incriminated Turajlich, Creedon, and Kampas (Tr. 60–61, 66–70, 73–83).

At the noon recess on October 6, 1959, Creedon withdrew his plea of not guilty to the conspiracy

[3] "Tr." refers to the transcript of the trial testimony.

charge in count 4 and pleaded guilty (R. 6a).[1] At that time the court charged the jury (Tr. 105-106):

> * * * in your absence, the defendant Charles F. Creedon, who was charged in one of the indictments with conspiracy, has pleaded guilty to conspiracy. The Court accepted his plea after taking proper precautions so he is no longer a defendant in this case. He is no longer sitting at counsel table with his lawyer. The matter affecting Creedon will be disposed of by the Court at some other time and place. The fact that Creedon pleaded guilty should not affect the defendants Charles Kampas or George Turajlich in your minds in any degree. Those two defendants who you now see at the counsel table are surrounded by the presumption of innocence which presumption stays with them until the prosecution proves them guilty beyond a reasonable doubt of the crime they are charged with. So the fact one Creedon has pleaded guilty should not affect your judgment as to the remaining two defendants. * * *

Petitioner's counsel then asked for a mistrial by reason of the court's acceptance of Creedon's plea on the ground that his changed plea surprised and prejudiced them, and left them saddled with a jury which Creedon's lawyer had a hand in choosing. The motion was denied but a continuance was granted until the next morning (R. 18a–36a).

In its final instruction the court reminded the jury that they were trying the cases only against petitioners Turajlich and Kampas, and that they were not to

[1] The other three counts against Creedon were dismissed on October 8, 1959 (R. 5a).

be concerned with the charges against the other three who had pleaded guilty. The court continued (R. 12b):

> You are only to decide and pass upon the guilt or innocence of George Turajlich and Charles Kampas. As I have already told you, the fact that Riley and Randall have pleaded guilty to robbery and conspiracy, and that Creedon has pleaded guilty to conspiracy, should have no effect whatsoever on your consideration of the guilt or innocence of Turajlich and Kampas. The guilty pleas of Riley, Randall and Creedon are not evidence against Kampas and Turajlich, and not to be considered by you in determining the guilt or innocence of either. You decide their cases on the evidence you have heard in this court from the witness stand and from the exhibits.

2. After the jurors had been deliberating for a time they returned to the courtroom with two questions as follows (R. 30b):

> THE COURT:
>
> You have submitted two questions.
>
> In Re: Defendant, Charles Kampas
>
> Can we the jury find the defendant guilty solely of overt act No. 4 and not find him guilty of the fourth count of No. 15689.
>
> In Re: George Turajlich, Defendant
>
> Can we find this defendant guilty of fourth count—overt acts 1 and 2 and not find him guilty of overt act 3.

The court instructed the jury, in part as follows (R. 31b):

> The short answer, ladies and gentlemen, is, you do not find them guilty of any overt act.

> You find them guilty or not guilty of conspiracy, which is the fourth count.
>
> The fourth count includes overt acts 1, 2, 3 and 4. You don't find him guilty—either of them guilty or not guilty of any overt act. You find them either guilty or not guilty of conspiracy, which is the fourth count.

The court pointed out, however, that it had previously instructed the jury that there was insufficient evidence to prove the first two overt acts (see R. 19b). The court further explained why it had considered these two overt acts as not proved and again instructed the jury not to consider them (R. 33b-34b).

ARGUMENT

1. Petitioners contend that by allowing Creedon to plead guilty to the conspiracy charge and refusing to grant a severance at that stage of the proceedings the court denied them a fair trial. This is said to result from the probability that the jurors would also find petitioners guilty on the basis of Creedon's plea, and from an alleged dilution of their right to peremptory challenges by being left handicapped with a jury which Creedon's counsel assisted in picking before bowing out of the case (Pet. 7-13). The argument is without substance.

a. The record shows that Creedon's action did not come as a complete surprise to the petitioners (R. 21a), although it did to the government (R. 23a, 30a). Moreover, the court granted petitioners a continuance until the next day. There was therefore no reason for the court not to accept Creedon's plea when he chose to make it.

The trial court amply protected the remaining defendants by its explicit cautionary instructions, both at the time of the acceptance of Creedon's guilty plea (Tr. 105–106) and in the final charge (R. 125), that the guilty plea should have no effect upon the jury's consideration of the guilt or innocence of petitioners Turajlich and Kampas.[4] *Nemec* v. *United States*, 178 F. 2d 656, 661 (C.A. 9), certiorari denied, 339 U.S. 985; *United States* v. *Hartenfeld*, 113 F. 2d 359, 362 (C.A. 7), certiorari denied, 311 U.S. 647; *Hines* v. *United States*, 131 F. 2d 971, 974 (C.A. 10). These instructions were particularly easy for the jury to apply here since Creedon's part in the conspiracy as a police officer was different from that of petitioners and the judge charged the jury that overt act 2 of the conspiracy count, which named Creedon, had not been proved (see the Statement, *supra*, pp. 4, 7). It must be presumed that the jury followed these explicit instructions. *Dell' Paolo* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

b. Petitioners were not deprived of their right to peremptory challenges under Rule 24(b), F. R. Crim. P. (*supra*, p. 2). The defendants, having been given the ten peremptory challenges to which they were jointly entitled under the Rule, have no ground

[4] These correct instructions are in marked contrast with those held erroneous in *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3), and *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2), where the trial courts gave the respective juries too much latitude for speculation upon the effect of the pleas of guilty by the codefendants.

for complaint that some of the defendants later decided for reasons of their own to plead guilty. *United States* v. *Macke*, 159 F. 2d 673 (C.A. 2), certiorari denied, 331 U.S. 810. Moreover, the defendants here were given by the court three additional challenges which they had requested (R. 30a; transcript of the argument on motion for a new trial, p. 22).

The substance of petitioners' argument on the motion for a new trial was that the acceptance of Creedon's guilty plea left petitioners with a prejudiced jury since Creedon's attorney had a hand in the selection of three Irish jurors; that Irish jurors, because of being Catholic and knowing of confession, would believe that the Irish government witness, Riley was telling the truth, but would tend not to believe petitioners Turajlich and Kampas, who were of Slavic descent and might be Communists (transcript of the argument on motion for a new trial, pp. 11–14). These speculative generalities are so insubstantial that petitioners' present counsel does not repeat them explicitly, but is content with asserting (Pet. 12) that this jury question raises a "delicately suggested prejudice."

2. Petitioners claim (Pet. 13) that the trial court erred in the supplemental charge given in response to two questions asked by the jury during its deliberations. This issue, however, relates only to the conspiracy count on which the sentence runs concurrently with the sentence on the substantive count. Therefore, even if petitioners' contentions were correct,

their convictions on the other counts would still suffice to sustain the judgment. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641, 642, note 1.

In any event petitioners' contentions are without merit. First, unlike *Villippou* v. *Albion Vein Slate Co.*, 250 U.S. 76, where the court gave a supplementary instruction requested by the jury in the absence of the parties without affording them an opportunity either to be present or to make timely objection, here the supplementary charge was given to the jury with petitioners' counsel present (R. 30b). Counsel certainly could have objected to this instruction or asked for clarification if he had deemed that necessary. It was not required that the court affirmatively ask counsel if he wanted to object. Since petitioners failed to object, they cannot now claim that the instruction was erroneous. See Rule 30, F. R. Crim. P. (*supra*, p. 3).

Second, the court's instructions were correct. The jury was apparently confused as to whether it was necessary to find petitioners guilty as to certain overt acts. The court clarified this confusion by explaining that the jury's sole finding should be whether or not petitioners were guilty of conspiracy; and that they need not make findings as to guilt or innocence of particular overt acts. The court did not retreat from its position in the original charge that the jury should not consider overt acts 1 and 2. The review in the supplementary charge of the insufficient evidence as to overt acts 1 and 2 was not harmful, but made clear

the particular overt acts which the court admonished the jury not to consider (R. 33b-34b).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
Malcolm Richard Wilkey,
Assistant Attorney General.
Beatrice Rosenberg,
Robert G. Maysack,
Attorneys.

July 1960.